



REPUBLIC OF KENYA



Mugathi v Nzuki (Civil Appeal E159 of 2022) [2023] KEHC 18246 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E159 OF 2022

MW MUIGAI, J

MAY 25, 2023

BETWEEN

CYRUS GITHAIGA MUGATHI APPLICANT

AND

BENJAMIN MUNYAO NZUKI RESPONDENT

RULING

Notice of Motion

1. Vide an application dated 18.11.2022 filed under Article 159 2 (a) and (d) of the Constitution of Kenya Section 3A,79G of the Civil Procedure Act and Order 21 rule 1b, Order 22 rule 22, order 42 Rule 6, Order 50 rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules, the Applicant sought the following orders, that;
 - a. Spent
 - b. Spent
 - c. This Hon. Court be pleased to grant stay of execution of the Judgement and/ or decree issued by Hon. M.E. Analo, Senior Resident Magistrate on 19th October 2022 pending hearing and determination of the Appeal in Machakos HCCA 159 of 2022.
 - d. This Hon. court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
 - e. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the Affidavit of Cyrus Githaiga Mugathi deponed on November 18, 2022 who stated that judgment was entered on 19.10.200 and he was found to be 100% liable and is to pay Kshs 400,000 for general damages, Kshs 6,550 for special damages together with costs and



interest and being dissatisfied with the judgment has appealed against it. The Applicant contends that the Appeal has high chances of success, that the Respondent may levy execution against them as 30 days stay of execution that was granted is on the verge of lapsing rendering the appeal nugatory causing irreparable loss and damage upon them.

3. It was deposed that the insurer, M/s Directline Assurance Company is able and willing to provide security for the entire decretal sum in the form of a bank guarantee to be issued by Family Bank which he says is a reputable bank in Kenya without any partial payments/ settlements being made. That further, of there is an order for partial payment, the payments will be utilized and alienated by the Respondents and recovery of the same will be arduous in the event the intended appeal is succeeds. Lastly, it was contended that the application was filed in good faith.

Response

4. In opposition the Application, the Respondent filed a replying affidavit deposed on December 9, 2022 in which it was opined that he is a church minister with the Africa Inland Church –Kenya and currently teaching at Mulango Bible College in Kitui County. He also offers pastoral duties on Sundays at AIC Kyangunga in Kitui County where he is a pastor. It was contended that he was capable of refunding the decretal amount of Kshs 499,935 should the Appeal succeed.
5. Further that the Appellant did not adduce any evidence to dispute liability in the lower court and therefore liability is a settled issue. The court was urged to order that 50 % of the decretal amount be released to the Respondent and the balance deposited in an interest earning account of both advocates on record should stay be granted. Alternatively, the entire decretal sum should be released to him and the application be dismissed.
6. The application was canvassed by way of written submissions.

Applicant's Submissions Dated January 3, 2023

7. The Applicant submitted that in the subordinate courts, it is not a requirement to show that the Appeal has high chances of success and the Applicant only needs to show that he has an arguable appeal as stated in the case of *Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi* [2015] eKLR.
8. It was submitted that the conditions for be fulfilled for stay of execution are provided under Order 42, rule 6 and Order 22 rule 22(1) as well as the case of *Tabro Transporters Limited vs Absalom Dova Lumbasi* [2012] eKLR. As regards whether substantial loss will occur, it was submitted that the Appellant has furnished the court with a bank guarantee while the Respondent's means are not known as it has not disclosed nor furnished the court with any documentary evidence to prove the financial standing. That the decretal sum was a substantial sum and in the event the Respondent is unable to repay it, the Appeal will have been rendered nugatory and the Applicants exposed to irreparable damage. To buttress this point, reliance was placed on the case of *Edward Kamau & Another v Hannah Mukui Gichuki & Another* [2015] eKLR, *Tabro Transporters (supra)*.
9. Secondly, the Applicant submitted that it was ready and willing to furnish security, a bank guarantee by its insurer. The court was urged to exercise its discretion while citing the case of *Esther Wamaitiba Njibia & 2 others v Safaricom Limited* [2014] eKLR.

Respondent Submissions Dated 03.02.2023

10. The Respondent submitted that the Applicant has failed to fulfil the conditions under Order 42 Rule 6 (2) of the *Civil Procedure Rules*. The Applicant has not demonstrated what substantial loss he is likely



to suffer for paying the monetary claim of Kshs 400,000 while the Respondent has demonstrated that he is capable of refunding the said amount.

11. On the bank guarantee, it was submitted that Family Bank Limited and M/S Directline Assurance Company are not parties to the case and cannot offer sufficient security as it would be almost impossible for the Respondent to enforce the same should the circumstances demand.
12. Thirdly, it was contended that the appeal is on quantum of damages only and on this account, the court was urged to order at least half of the decretal amount be released to the Respondent should stay be granted.

Determination

13. The court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.
14. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
16. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-



- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial

17. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.’

18. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Arguable Appeal

19. The Applicant has submitted that he has a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted. Further, that the Respondent will be unable to refund the decretal sum if the appeal is successful. However, the Respondent stated that he is a man of means and will be able to refund the said amount. The Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.



20. This was emphasized in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

21. The Respondent in this case has not provided any evidence to show that he is capable of refunding the decretal sum. This was the position in the case of *Stanley Karanja Wainaina & Another v Ridon Ayangu Mutubwa* Nairobi H.C.C.A. 427/2015 where it was stated that:

“...It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge..”

22. The Respondent has however on oath demonstrated that he is capable of paying the decretal sum should the Appeal succeed. I therefore find that the Applicant has not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question.

Undue Delay

23. As to whether the Application has been filed without undue delay, judgment was entered on October 19, 2022 and this application was filed on November 24, 2022. A month later. The court finds that the Application has not been filed without undue delay.

Security

24. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of



the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

25. This court is persuaded by the submissions of the Respondent that Family Bank Limited and M/S Directline Assurance Company are not parties to the case and cannot offer sufficient security as it would be almost impossible for the Respondent to enforce the same should the circumstances demand. Furthermore, the document on record has not been executed, it is for a period of 12 months from February 18, 2022 which has since lapsed and this court cannot rely on such a document.

Disposition

26. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
- a. Stay of execution pending Appeal is granted on condition that the Appellant remit half of the decretal sum to the Respondent and the other half be deposited in a joint interest earning account of parties’ advocates on record within 60 days of this Ruling.
 - b. The Trial Court file shall be availed within the stated period.
 - c. The Record of Appeal shall be prepared and served
 - d. Costs will abide the Appeal.
 - e. Further mention for directions shall be on 24/7/2023.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25/5/2023 (VIRTUAL/
PHYSICAL CON-FERENCE)**

M.W. MUIGAI

JUDGE

In The Presence Of:

Ms Waweru H/B Ouko - For the Appellant - Online

Mr. Nabwere H/B for Mwalimu - For the Respondent – Online

Geoffrey/Patrick – Court Assistant (S)

